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COURT OF CRIMINAL APPEALS
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No. _____

In the Court of Criminal Appeals of the State of Texas

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COURT OF CRIMINAL APPEALS
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EX PARTE JORDAN BARTLETT JONES, APPELLANT

On Appeal from the Twelfth Court of Appeals

Cause No. 12-17-00346-CR

Brief of Amicus Curiae by Benjamin Barber

In Support of the Jones

BENJAMIN BARBER
10043 SE 32ND Ave
Milwaukie, Oregon 97222
(971) 270-0855
starworks5@gmail.com

TABLE OF AUTHORITIES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Introduction and Statement of Amicus Curiae

Benjamin Barber submits this brief as amicus curiae in support of Jones, and in opposition of section 21.16 of the Texas Penal Code, entitled "Unlawful Disclosure or Promotion of Intimate Visual Material." Barber files the brief because he is currently litigating a similar bill in Oregon ORS 163.472 entitled "Unlawful Dissemination of an Intimate Image", and provides a rebuttal to the theories posited by Amicus Curiae submitted by Cyber Civil Rights Initiative "CCRI. Specifically petitioner intends on contrasting the different theories, including privacy, publicity, copyright, emotional distress, cyberspace law, and the First Amendment.

The central thesis is that the statute is preempted by the first amendment, and that even if the statute could avoid strict scrutiny, the statute is expressly and completely preempted by the Copyright Act 17 USC 201(e), 301(a) and the Communications Decency Act 47 USC 230. However the position of the state or of CCRI, that non defamatory reputational or emotional injury, can be a legal basis to avoid first amendment strictures is flawed, and is colloquially known as a "heckler's veto". Moreover the fact that the state

does not punish all “non disclosure” of “private” facts, means that it cannot avoid strict scrutiny and must be struck down.

The state can no more punish “unlawful dissemination of intimate visual material”, than it can punish “unlawful dissemination of intimate biographical material”, or than it can punish the #metoo movement based on its reputational harm, and ironically because of this statute a person can’t rebut such a libelous statement made.

Rebuttal of States Arguments.

The state claims that “The level of scrutiny depends on the value of the speech”, however this was refuted by the courts decision in U.S. V Stevens 130 S. Ct. 1577, 1591, which held that animal crush videos were an invalid content based restriction of speech.

> “In Miller we held that "serious" value shields depictions of sex from regulation as obscenity. 413 U.S., at 24-25, 93 S.Ct. 2607. Limiting Miller's exception to "serious" value ensured that "`[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.'" Id., at 25, n. 7, 93 S.Ct. 2607 (quoting Kois v. Wisconsin, 408 U.S. 229, 231, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972) (per curiam)). We did not, however, determine that serious value could be used as a general precondition to protecting other types of speech in the first place. Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "`[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" Cohen v. California, 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (quoting Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting); alteration in original).”

Likewise the contention that “Focusing on content for the same reasons the content is less protected is not a viewpoint restriction” is not subject to strict scrutiny, fails because the fact that depictions of sex are not obscenity and therefore are not proscribable and is not “less protected”. Indeed the government is supposed to leave those judgments about what is or is not serious value to the listener, as noted in United States V Playboy Entertainment Group 529 U.S. 803, 813

> "The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."

The State's contention that the revenge porn contains no inherent ideas worthy of public discussion is flawed, because as Senator Anthony Wiener scandal suggests that such a disclosure tied inexorably of his scandalous affair would be in fact unlawful. Moreover the disclosure could contain exculpatory evidence, for example when Missori Gov. Eric Greitens was allegedly publically defamed with an sexual assault allegation, and then was accused of invading the accusers privacy and "revenge porn" when he threatened to disclose the intimate images that depicted the events tied to the same allegation.

Since "the disclosure of the visual material causes harm to the depicted person", yet disclosures of other of visual materials is not unlawful means that it is an unlawful content based restriction of speech, due to the fact that the statute is underinclusinve to stop the "secondary effects" which the states purports to be trying to prevent. Brown v. Entertainment Merchants Association 564 US 786, 802 ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. See City of Ladue v. Gilleo, 512 U. S. 43, 51 (1994); Florida Star v. B. J. F., 491 U. S. 524, 540 (1989).")

Moreover the non defamatory reputational harm is not a type of compelling government interest which is a "secondary effect" which is thought to be "legitimate", as the court explained in Boos v. Barry, 485 U.S. 312, 321

> "Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in Renton. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech."

Before the ratification of the US constitution, one of the most popular tracts on civil liberties was called "Cato Letters"[1], these letters were published by Benjamin Franklin himself in his newspaper *The New England Courant,* which defended his brother's freedom of speech and attacked the governor's strict and unjust policies

> "Without freedom of thought, there can be no such thing as wisdom; and no such thing as publick liberty, without freedom of speech: Which is the right of every man, as far as by it he does not hurt and control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know."

This is similar to the work by Thomas Paine's work Rights of Man he contrasts the dichotomy between civil and natural rights, which was a work that was developed after consulting with Thomas Jefferson. This restates the notion that insofar that a person can exercise their freedom of speech without invading the rights of others, and a right to be able to judge requires the ability to receive the information from which they can judge.

> "The natural rights which he retains are all those in which the Power to execute is as perfect in the individual as the right itself. Among this class, as is before mentioned, are all the intellectual rights, or rights of the mind; consequently religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. They answer not his purpose. A man, by natural right, has a right to

1 Renowned historian Clinton Rossiter stated "no one can spend any time on the newspapers, library inventories, and pamphlets of colonial America without realizing that Cato's Letters rather than John Locke's Civil Government was the most popular, quotable, esteemed source for political ideas in the colonial period."Rossiter, Clinton (1953). Seedtime of the Republic: the origin of the American tradition of political liberty. New York: Harcourt, Brace. p. 141.

> judge in his own cause; and so far as the right of the mind is concerned, he never surrenders it. But what availeth it him to judge, if he has not power to redress? He therefore deposits this right in the common stock of society, and takes the ann of society, of which he is a part, in preference and in addition to his own. Society grants him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right."

It is from this reasoning that the court, that the legislature cannot simply weigh the cost benefit analysis of a category of speech, and then punish the speaker if the value of the speech is lower than the costs. US v. Stevens, 559 US 460, 130 S. Ct. 1577, 1585

> "As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60 (1803)."

Moreover, the restriction has is limited to the exceptions which were traditionally unprotected, meaning speech that does not inflict injury on the rights of another persons rights, and since the speech being regulated is not in these categories for example integral to criminal conduct or obscene, the state cannot conclude that "revenge porn" is excepted from the strict scrutiny. see US v. Stevens 559 US 460, 130 S. Ct. 1577, 1584

> "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to the bar, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." (citations and quotes ommitted)

Privacy Rights Preemption

The state claims that it is protecting the privacy rights of individuals, "under circumstances in which the depicted person had a reasonable expectation of privacy in its contents", however the state does not state which of the notions of privacy they are

referring to. There are already laws against Invasions of Privacy through surreptitious recordings, and against the computer trespass which render this law unnecessary. The law tries to cover the torts of publicity and disclosure of private facts, rather than the actual intrusion upon seclusion, or false light given that the disclosures are factual. Moreover stating without stating what "invasions" of privacy are reasonable, and relying on a constructive knowledge standard, the requirement is unconstitutionally vague.

While the petition for the state did cite Snyder v. Phelps, 562 U.S. 443, 453 (2011) claiming there might be a two levels of protection, to support that there is a lower level of protection for matters of private concern. However the court in that case said that "Other signs would most naturally have been understood as suggesting – falsely — that Matthew was gay.", as such the invasion of privacy is one of a "false light" which could not be punished because it was a hyperbolic opinion on a matter of public concern. In contrast all of the types of core protected speech "rest[s] on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980)

The supreme court has never held that a disclosure of facts of lawfully obtained true facts could be punishable under the first amendment, because it addresses matters of public concern, rather that distinction would be a content based restriction of speech and need to be the least restrictive means of accomplishing the the purported interest, and unlawful because the government was not punishing only certain types of true facts.

> "Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979)

> "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."Smith v. Maryland, 442 US 735, 743-44 (1979)
>
> "[E]ven if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 US 435, 443(1976)

Rather the notion that a private person has the right to consent to a disclosure absent of any affirmative duty or invasion of right, is considered a "heckler's veto". A hecklers veto is when the government allows an individual who dislikes a certain other persons speech, to deny the other person their right to speech due to their emotional reaction to that speech, just like in the case of Boos v. Barry, 485 U.S. 312, 321 (1988) see Nativity Scenes Comm. V. City Of Santa Monica 784 F.3D 1292-93.

> "[T]he "heckler's-veto" doctrine, which holds that a regulation of speech is to be deemed content based when "listeners react to speech based on its content and the government then ratifies that reaction by restricting the speech in response to listeners' objections." Ctr. for Bio-ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't, 533 F.3d 780, 789 (9th Cir. 2008) (emphasis omitted). The doctrine prohibits the government from pointing to the "reaction of listeners" to speech as a "secondary effect" justifying that speech's regulation; in other words, the government may not regulate speech on the grounds that it will cause its hearers anger or discomfort. Id. (citing Boos v. Barry, 485 U.S. 312, 321 (1988)). If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech."

Moreover the privacy interests known as "Appropriation of name and likeness" (publicity), are preempted by the first amendment and the Copyright Act, specifically because as the court In Sarver v. Chartier, 813 F. 3d 891 (9th Cir 2016) the right to publicity has been held to be applied narrowly to the exploitation of a persona, commercial advertising, rather than the expressive use of information about a person. More precisely a person cannot use the right of publicity to be able to censor a publication that bears their name or image, in the guise that they have a right to control their name and likeness. see Sarver at 905-906

> "that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life — including the stories of real individuals, ordinary or extraordinary and transform them into art, be it articles, books, movies, or plays. If California's right of publicity law applies in this case,it is simply a content based speech restriction. As such, it is presumptively unconstitutional and cannot stand unless Sarver can show a compelling state interest in preventing the defendants' speech"

Moreover the many circuits have held that the right to publicity is preempted by the copyright act 17 U.S.C. 301, because congress expressely preempted state laws which protect rights equivalent to copyright, and that the laws would stand as an obstacle or would cause inevitable conflict with copyright exceptions such as fair use of images.

The issue therefore, is whether section 21.16 is preempted by 17 U.S.C. § 301(a). See, e.g., Laws, 448 F.3d at 1137. 17 U.S.C. § 301(a) preempts plaintiff's claims if (1) "plaintiff's work come[s] within the subject matter of copyright" and (2) the legal or equitable rights granted under state law "are equivalent to any of the exclusive rights within the general scope of copyright." Montz v. Pilgrim Films & Television, 649 F.3d 975, 979 (9th Cir. 2011). "a right is equivalent to one of the rights comprised by a copyright if it is infringed by the mere act of reproduction, performance, distribution or display." Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663, 676-77 (7th Cir. 1986)

The gravamen of the right protected by section 21.16 is the right to consent to disclosure of images, which is equivalent to the rights in 17 U.S.C. § 106 because "In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work. See Fox Film Corp. v. Doyal, 286 U. S. 123, 286 U. S.

127 (1932)" Stewart v. Abend, 495 U.S. 207, 229 (1990). Likewise the extra elements do not save the law from preemption from copyright, Grosso v. Miramax Film Corp.,383 F.3d 965, 968 (9th Cir. 2004). “By contrast, we have found a state law claim preempted when the extra element changes the scope but not the fundamental nature of the right.”

In Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012):

> “We pointedly note that we address the unpublished status of the photos only under copyright principles, not privacy law. See Bond v. Blum, 317 F.3d 385, 395 (4th Cir.2003) (“the protection of privacy is not a function of the copyright law.”). “It may seem paradoxical to allow copyright to be obtained in secret documents, but it is not. [F]ederal copyright is now available for unpublished works that the author intends to never see the light of day.”

In Garcia v. Google, Inc. 786 F.3d 733, 745 (9th Cir. 2015):

> “This relief is not easily achieved under copyright law. Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from — and incompatible with — copyright and copyright's function as the engine of expression.” ... “Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a "right to be forgotten," although recently affirmed by the Court of Justice for the European Union, is not recognized in the United States.”

In Maloney v. T3Media, Inc. ,688 F.3d 1164 (9th Cir. 2017):

> “Plaintiffs' ... challenge “control of the artistic work itself.” Laws, 448 F.3d at 1142. Pursuant to Laws, the subject matter of the state law claims therefore falls within the subject matter of copyright. We believe that our holding strikes the right balance ... permitting photographers, the visual content licensing industry, art print services, the media, and the public, to use these culturally important images for expressive purposes. Plaintiffs' position, by contrast, would give the subject of every photograph a de facto veto over the artist's rights under the Copyright Act, and destroy the exclusivity of rights that Congress sought to protect by enacting the Copyright Act.”

The argument that a person can move the dispute from one sounding in copyright to one in contract, because of an constructive, implied in fact, or even oral promise not to disclose the material, 17 USC § 204 requires that in order to transfer such a right the transfer would have to be done in writing. See Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F. 3d 1146, 1157 “Section 204(a) is designed to resolve disputes between owners

and transferees and to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership."

Likewise a breach of implied contract claim was preempted by the copyright, because the promise not to disclose, would logically interfere with the rights of the copyright owner. See e.g. Montz v. Pilgrim Films & Television, Inc., 606 F. 3d 1153 , 1159

> "The complaint contends that "the Plaintiffs' disclosure of their ideas and concepts [was] strictly confidential," and that "[b]y taking the Plaintiffs' novel ideas and concepts, exploiting those ideas and concepts, and profiting therefrom to the Plaintiffs' exclusion, the Defendants breached their confidential relationship with the Plaintiffs." Such claim simply echoes the allegations of the breach-of-implied-contract claim, which we have already deemed preempted. Indeed, the alleged breach of confidence stems from an alleged violation of the very rights contained in § 106 — the exclusive rights of copyright owners to use and to authorize use of their work. Given that the plaintiffs' breach-of-confidence claim is not qualitatively different from a copyright claim, we conclude that it was also properly dismissed."

Moreover Congress explicitly stated that they did not want government agencies expropriating their copyrights when it enacted 17 U.S.C. 201(e) See HR Rep. No 94-1476 94th Cong. Sess. 2d (1976) at 123-124.

> "Subsection (e) provides that when an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, have not previously been voluntarily transferred, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.
>
> The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer. It is the intent of the subsection that the author be entitled, despite any purported expropriation or involuntary transfer, to continue exercising all rights under the United States statute, and that the governmental body or organization may not enforce or exercise any rights under this title in that situation."

See also Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 803 (5th Cir. 2002) ("Section 201(e) of the Act reflects Congress's intention to protect copyrights from involuntary appropriation by government entities."); Schnapper v. E Foley 667 F.2d 102, 115 (D.C. Cir 1981).

> "We are aware that there is at least a theoretical possibility that some copyright laws may be used by some nations as instruments of censorship. Fears had been expressed, for example, that the Soviet Union would, through use of a compulsory-assignment provision in its domestic copyright laws, attempt to prevent foreign publication"

Cyberspace Law

Congress created the Communications Decency Act 47 U.S.C. § 230, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation" § 230(b)(2), by providing that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1), and "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." § 230(e)(3) Though the statute ORS 163.472 provides immunity for "providers" of interactive computer service, but not the users of those services by its terms, despite the fact that the statue clearly exempts a "provider or user" see e.g. Batzel v. Smith, 333 F.3d 1018, 1030 ("[T]he language of § 230(c)(1) confers immunity not just on "providers" of such services, but also on "users" of such services."); Barrett v. Rosenthal 40 Cal. 4th 33, 63

> "We conclude there is no basis for deriving a special meaning for the term "user" in section 230(c)(1), or any operative distinction between "active" and "passive" Internet use. By declaring that no "user" may be treated as a "publisher" of third party content, Congress has comprehensively immunized republication by individual Internet users.

As long as someone else provided the information, the user cannot be treated as a speaker or publisher, regardless of whether it is for defamation, or negligence, or criminal conduct. Backpage. Com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1275 (W.D.Wa. 2012) ("If Congress did not want the CDA to apply in state criminal actions, it would have said so"); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th cir 2009)

> "But "a law's scope often differs from its genesis," Craigslist, 519 F.3d at 671, and the language of the statute does not limit its application to defamation cases. Indeed, many causes of action might be premised on the publication or speaking of what one might call "information content." A provider of information services might get sued for violating anti-discrimination laws, see, e.g., Roommates.Com, 521 F.3d 1157; for fraud, negligent misrepresentation, and ordinary negligence, see, e.g., Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008), cert. denied, ___ U.S. ___, 129 S.Ct. 600, 172 L.Ed.2d 456; for false light, see, e.g., Flowers v. Carville, 310 F.3d 1118 (9th Cir. 2002); or even for negligent publication of advertisements that cause harm to third parties, see Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992). Thus, what matters is not the name of the cause of action — defamation versus negligence versus intentional infliction of emotional distress — what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230(c)(1) precludes liability."

Congress clearly had the ability to enact and preempt the state throught the commerce clause of Article 1 section 8 of the constitution, moreover congresses commerce powers "encompasses an implicit or "dormant" limitation on the authority of the States to enact legislation affecting interstate commerce." Backpage. Com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1285 (W.D.Wa. 2012).

> "Where a state statute only has incidental effects on interstate commerce, the statute will be upheld "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest," where "its effects on interstate commerce are only incidental," and where the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." Healy, 491 U.S. at 336, 109 S.Ct. 2491. Finally, there exist unique aspects of commerce that demand national treatment. See, e.g., Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244 (1886) (holding railroad rate exempt from state regulation)." ...
>
> "The Internet is likely a unique aspect of commerce that demands national treatment. "The Internet is wholly insensitive to geographic distinctions" and itself "represents an instrument of interstate commerce." Amer. Libraries Assoc. v. Pataki, 969 F.Supp. 160, 173 (S.D.N.Y.1997). See also Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir.2008) ("Online services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services."). Thus, "[t]he Internet, like ... rail and highway traffic ..., requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." Pataki, 969 F.Supp. at 182; cf. Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 7 S.Ct. 4, 30 L.Ed. 244 (1886) (holding railroad rate exempt from state regulation)."

Dated: 02/27/19

Respectfully submitted,
By: /s/ Benjamin Barber
Benjamin Barber

CERTIFICATE OF SERVICE

I certify that, on 02/27/19, I served electronically a copy of this brief on counsel of record, as listed below:

Mark Bennett
mb@ivi3.com
BENNETT & BENNETT
917 Franklin Street, Fourth Floor
Houston, Texas 77002

Attorney for Respondent

Michael J. West
Smith County Asst. Dist. Attorney
mwest@smith-county.com
Courthouse, Fourth Floor
100 North Broadway
Tyler, Texas 75702

Attorney for Smith County

Glenn A. Ballard, Jr.
glenn.ballard@dentons.com
Mukul S. Kelkar
mukul.kelkar@dentons.com
DENTONS US LLP
1221 McKinney Street, Suite 1900
Houston, TX 77010
(713) 658-4633

Attorneys for Media Coalition

Stacey M. Soule, State Prosecuting Attorney
John R. Messinger,
Asst. State Prosecuting Attorney
information@spa.texas.gov
P.O. Box 13046
Austin, Texas 78711

Attorneys for State

Michael A. Bamberger
michael.bamberger@dentons.com
Richard M. Zuckerman
richard.zuckerman@dentons.com
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 768-6700

Attorneys for Media Coalition

Lisa Bowlin Hobbs
Lisa@KuhnHobbs.com
KUHN HOBBS, PLLC
3307 Northland, Suite 310
Austin, Texas 78731
(512) 476-6003

Attorneys for Cyber Civil Rights Initiative

Dated: 02/27/19

Respectfully submitted,
By: /s/ Benjamin Barber
Benjamin Barber